IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

No. 169

BENJAMIN F. KITCHEN, JR.,
Petitioner,

versus

ELIZABETH FRANZHEIM REESE.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF LOUISIANA

PETITION FOR REHEARING

PETITIONER presents his petition for a rehearing of this Court's Order dated October 9, 1967, denying the Petition for Writ of Certiorari to the Supreme Court of Louisiana, and in support thereof with respect shows:

GROUNDS FOR REHEARING

The constitutional question raised in this case relates to the action of the Louisiana courts in destroying vested prop-

erty rights and thereby violating protection afforded by the United States Constitution.

On the same date of this Court's Order mentioned above, October 9, 1967, an article appeared in the Tulane Law Review which discussed in great detail the decision of the Supreme Court of Louisiana in the case at bar entitled "Succession of Simms—The [Civil] Law is a Jealous Mistress," 41 Tulane Law Review 885 (1967). The author is highly critical of the decision in the findings of the Supreme Court of Louisiana. The importance of this article is an intervening circumstance of such significance that the Petitioner urges that the problems be re-examined.

The premises on which this application is based are incontrovertible:

(1) Petitioner's son was vested with an estate valued at approximately $500,000,[1] being a vested remainder in a portion of Louisiana properties appraised at $5,876,155.

(2) Petitioner's son was divested of this estate by the Supreme Court of Louisiana through its interpretation of Louisiana law.

(3) Vested rights, such as were transmitted to Petitioner's son, are protected by the United States Constitution. The Supreme Court of Louisiana has invalidated the will of Mrs. Lillie Weir Simms by holding that the vested interest was a "prohibited substitution," thus meeting head-on a conflict with the federal constitution.

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[1] See "Succession of Simms—The [Civil] Law is a Jealous Mistress," Id. at page 886, Footnote 9.

(4) Importance of the decision:

(A) Universally (other than in Louisiana) and traditionally accepted trust devices cannot be used to transfer ownership in Louisiana royalty interests.[2] Such interests are owned by persons in all of the United States, and indeed throughout the world; they are freely assignable in small fractional interests, yet future testamentary trusts cannot convey ownership to the beneficiaries. The magnitude of the problem is apparent when one considers that attorneys in 49 of the 50 states almost daily prepare wills containing trust provisions and that Louisiana royalty interests comprise some portion of countless thousands of estates. Louisiana happens to be the second largest oil producing state and had a total production in the fiscal year 1966-1967 of more than 505 million barrels of oil alone, which, at a market price of $3.00 per barrel, would amount to more than one and one-half billion dollars.

(B) The Louisiana Trust Code enacted in 1964 does not limit future application of the *Simms* decision. Knowledgeable Louisiana attorneys are convinced that such Code still does not permit a "prohibited substitution." A pertinent analysis, for example, was made in the Louisiana Bar Journal, Vol. XXIII, No. 2, 131, at page 137 (August 1965) by Mr. Thomas B. Lemann, a member of the Trust Advisory Committee, as follows:

> "I should caution you that with all these wonderful things that the new Trust Code does

[2] For example, to A in trust, with income to B for life, remainder to C.

> for you, there are some things it does not do for you and you should not, for example, think that you can set up a classical substitution as long as you put it in a trust. You still cannot have a substitution, involving a bequest to A and then at his death to B, in or out of trust. * * *"

(C) The *Simms* decision could create an onslaught of litigation by statutory heirs in Louisiana on contentions that wills of their ancestors were absolute nullities.[3]

Briefly, in response to reply briefs filed herein wherein some comment has been made that this Petitioner is the only party seeking Writ of Certiorari, we wish to point out, first, that only the great grandchildren of Mrs. Simms, of whom Petitioner is one, lose by the invalidity of the will; the rights of the other six great grandchildren, throughout this litigation, have been left to the protection of their mothers, each of whom qualified as tutrix and to undertutors. There is obvious conflict of interests between the parents, Mrs. Reese and Mrs. McCullar, and their respective wards.

Second, that only this Petitioner raised timely federal questions.

Plainly, the other parties have an advantage if the provisions of the will are struck down, in that they will receive their inheritance in full ownership as opposed to life estates burdened by discretionary rights in the trustees to make or not to make distributions from income. This is one of those rare cases in which certain proponents of a will stand to gain

[3] Id. at page 896, Footnote 66.

more by losing the case than by winning it. The attention of the Court is invited to the cited article, at pp. 886 and 887, which diagrams the relationships of the parties.

CONCLUSION

For the reasons set forth in this petition for rehearing, as well as the petition for certiorari previously filed, rehearing and certiorari should now be granted.

Respectfully submitted,

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By: _____
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PROOF OF SERVICE

I, Sylvia Roberts, attorney for petitioner, Dr. Benjamin F. Kitchen, Jr., Tutor of the minor, Benjamin F. Kitchen, III, and a member of the Bar of the Supreme Court of the United States, hereby certify that on this day I served copies of the foregoing Petition for Rehearing on:

Morris Wright, Esquire
Cobb and Wright
Whitney Building
New Orleans, Louisiana

Sidney Wright, Esquire
Texas National Bank Building
Houston, Texas

counsel for respondents, by mailing a copy thereof, postage prepaid, addressed to their offices as shown above.

Baton Rouge, Louisiana, this _____ day of October, 1967.

SYLVIA ROBERTS

CERTIFICATE OF COUNSEL

Pursuant to Rule 58, I hereby certify that the foregoing Petition for Rehearing is presented in good faith and not for delay, and is restricted to the grounds specified in Paragraph 2 of Rule 58.

SYLVIA ROBERTS